

No. 12297

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HERMAN HAYMAN,

*Appellant.*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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BRIEF OF APPELLEE.

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## BRIEF OF APPELLEE.

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### I.

#### Statement of Jurisdiction.

A. The United States District Court for the Southern District of California had jurisdiction over the Appellant and subject matter covered by the Indictment herein under the provisions of United States Code Title 18, Sections 78, 73 and 88 (1946 Ed.).

B. Defendant (Appellant) Herman Hayman was charged in Count One of an Indictment with falsely personating one Samuel T. Thompson, a true and lawful holder of a debt of, and due from the United States, to-wit, United States Treasury check No. 728,823, in violation of Section 78 of Title 18, United States Code. Appellant was charged in Count Two of the Indictment with falsely making, forging, and counterfeiting, and causing

and procuring to be falsely made, forged and counterfeited the endorsement and signature of the payee, to-wit, the endorsement and signature of Samuel T. Thompson, of United States Treasury check No. 728,823, in violation of Section 73 of Title 18, United States Code. Appellant was charged in Count Three with uttering and publishing as true and causing to be uttered and published as true, the false, forged and counterfeited endorsement and signature of the payee of United States Treasury check No. 728,823, to-wit, the false, forged and counterfeited endorsement and signature of Samuel T. Thompson, in violation of Section 73 of Title 18, United States Code. The offenses in Counts One, Two and Three of the Indictment are alleged to have occurred on March 26, 1946. Appellant was further charged in Count Four of the Indictment with falsely making, forging and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited, the endorsement and signature of the payee of United States Treasury check No. 351,100, to-wit, the endorsement and signature of 1st Lieut. Charles A. Wilbun, in violation of Section 73 of Title 18, United States Code. Count Five charged that Appellant did utter and publish as true and did cause to be uttered and published as true, the false, forged and counterfeited endorsement and signature of 1st Lieut. Charles A. Wilbun, payee, of United States Treasury check No. 351,100, in violation of Section 73 of Title 18, United States Code. The offenses in Counts Four and Five are alleged to have occurred on March 6, 1946. Count Six charged that Appellant did conspire with others to make, forge and counterfeit and cause to be falsely made, forged and counterfeited, the endorsement and signature of the payee of United States Treasury check No. 351,100, payable to Lieut. Charles A. Wilbun, and to utter and publish as

true, and cause to be uttered and published as true, the false, forged and counterfeited endorsement and signature of the payee of said check, in violation of Section 88 of Title 18, United States Code.

C. After trial, upon a verdict of guilty, sentence was imposed, and Defendant Herman Hayman appealed from said judgment. Judgment was affirmed, and Appellant then filed Motions to Vacate and Set Aside Judgment and Sentence, and for New Trial, and Petition for Writ of Habeas Corpus, which Motions and Petition were duly denied by the Trial Court.

D. This Court has jurisdiction of the appeal under the provisions of Section 2255 of Title 28, United States Code.

## II.

### Statement of the Case.

The record will show that on January 7, 1947, Appellant was found guilty by the Court, trial by jury having been waived, of the violation charged in each of the six counts of the Indictment, and that he was thereafter sentenced as follows:

Count One—Imprisonment for 10 years and a fine of \$2,000.

Count Two—Imprisonment for 10 years and a fine of \$1,000.

Count Three—Imprisonment for 10 years and a fine of \$1,000.

Count Four—Imprisonment for 10 years and a fine of \$1,000.

Count Five—Imprisonment for 10 years and a fine of \$1,000.

The periods of imprisonment under Counts One and Two to run consecutively; the periods of imprisonment under Counts Three, Four and Five to run concurrently with the period of imprisonment imposed under Count Two, making a total period of imprisonment of 20 years.

Count Six—A fine of \$10,000, and the payment of a total fine of \$10,000 to fully satisfy all fines imposed under Counts One to Six inclusive of the Indictment, and defendant to stand committed until said fine of \$10,000 is paid.

Defendant then appealed from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, and on November 6, 1947, the aforesaid judgment and sentence was affirmed without opinion. (*Hayman v. United States*, 163 F. 2d 1018 (1947)).

Thereafter, on May 11, 1949, Appellant filed Motion to Vacate Judgment and Sentence, and Petition for Writ of Habeas Corpus. [Tr. 2-13.] Said Motion and said Petition were duly considered by the Honorable Wm. C. Mathes, United States District Judge, and upon Findings of Fact and Conclusions of Law, an Order was entered by said Honorable Court denying said Motion and said Petition for Writ of Habeas Corpus.

Appellant then, within the time prescribed by law, filed his Notice of Appeal from said Order denying said Motion to Vacate Judgment and Sentence and for New Trial, and the record in this case was filed with the Clerk of this Honorable Court.



III.

ARGUMENT.

**A. Defendant Claims He Was Arrested Without a Warrant and Was Held Five Days Before He Was Taken Before a Committing Magistrate.**

The alleged lapse of time between the date when Appellant was taken into custody and the date of his arraignment before the United States Commissioner is immaterial because the government did not introduce or seek to introduce into evidence at the trial of the Appellant any confession or other incriminatory statements made by Defendant during that time.

*United States v. Bayer, et al.*, 331 U. S. 532, 539-541 (1947).

It is to be further noted that the Learned Trial Judge, in his Findings of Fact, found that Defendant was taken into custody on November 6, 1946, and arraigned before the United States Commissioner on November 7, 1946, at Los Angeles.

**B. Defendant Claims He Was Deprived of the Right to Have Assistance of Counsel for His Defense in That He Was Not Adequately Represented by Competent Counsel.**

The Learned Trial Judge, in his Findings of Fact, found that Appellant was fully and fairly represented at all stages of the proceedings in this Court by counsel of his own selection, namely, A. P. Entenza. [Tr. 18.] The Court further found that neither Messrs. Walter L. Gordon nor E. S. Ragland, as successor counsel to A. P. En-

tenza, ever made any suggestion of complaint in this Court prior to the filing of Motion by Appellant on May 11, 1949, that Defendant (Appellant) had not been fully and adequately and competently represented by A. P. Entenza throughout the trial and at the imposition of sentence.

The Court further found from the evidence adduced at the time of hearing on the Motion to Vacate Judgment and Sentence, and for New Trial, that A. P. Entenza appeared as counsel for Juanita T. Jackson, but that he did so only with the knowledge and consent and at the instance and request of the Defendant (Appellant) Herman Hayman.\*

**C. Defendant Claims He Was Sentenced to Ten Years to Run Consecutively for Violations Charged in Count One and Count Two, and That These Counts Constitute But a Single Offense.**

Count One of the Indictment charges a violation of Section 78 of Title 18 (1946 Ed.), United States Code—the false personation of one Samuel T. Thompson, a true and lawful holder of a debt of, and due from the United States, to-wit, United States Treasury check No. 728,823; and Count Two charges a violation of Section 73 of Title 18 (1946 Ed.), United States Code—the false making, forging and counterfeiting of the endorsement of

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\*Juanita T. Jackson was represented by A. P. Entenza at the time of her sentence in Cases No. 19064 CR., and No. 19065 CR., and was used as a government witness at the later trial of Herman Hayman (Appellant), No. 19036 CR.

the payee, namely, Samuel T. Thompson, of United States Treasury check No. 728,823. A conviction for the offense charged in Count Two required proof of facts not required to establish the offense charged in Count One. [Tr. 21.]

*Reger v. Hudspeth*, 103 F. 2d 825, 826 (C. C. A. 10, 1939).

Furthermore, there has been no showing that the sentences imposed for the violations charged in Counts Three, Four and Five, which are to run concurrently with the sentence imposed for the violation charged in Count Two, are sentences for the same offense as the one imposed on Count One. In fact, the contrary is to be found. Count Three charged the uttering of the forged endorsement and signature of Samuel T. Thompson on United States Treasury check No. 728,823. Count Four charged the forging of the endorsement and signature of Lieut. Charles A. Wilbun on United States Treasury check No. 351,100, and Count Five charged the uttering of the forged endorsement and signature of Lieut. Charles A. Wilbun on United States Treasury check No. 351,100. The offenses charged in Counts One, Two and Three were committed on March 26, 1946. The offenses charged in Counts Four and Five were committed on March 6, 1946.

### Conclusion.

It is respectfully submitted that no irregularities occurred in the Defendant's arraignment, after commitment, and that no use of any confession or other incriminatory statements that would have affected Defendant's conviction was made at the trial; that the Defendant was fully and adequately represented by competent counsel at all stages of all proceedings in the Trial Court; that Appellant was not sentenced twice for a single offense as Count One and Count Two of the Indictment charge entirely separate and distinct offenses, and in any event, the sentences imposed on Counts Four and Five (which charged violations concerning a different check on a different date from the violations charged in Counts One, Two and Three), to run concurrently with the sentence imposed on Count Two, charge separate and distinct offenses with that involved in Count One; and that the Motion to Vacate Judgment and Sentence and to Grant a New Trial was properly denied by the Trial Court.

Respectfully submitted,

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